Bleyer Industries, Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC. Case 6-CA-14854

February 26, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on August 28, 1981, by Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, herein called the Union, and duly served on Bleyer Industries, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 6, issued a complaint on September 9, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 10, 1981, following a Board election in Case 6-RC-9023, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about August 14, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 21, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 28, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. The Union also filed a Motion for Summary Judgment. Subsequently, on October 20, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Motions for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motions for Summary Judgment

In its answer to the complaint and its response to the Motions for Summary Judgment, Respondent contests the validity of the Union's certification. Respondent admits its refusal to bargain, but denies that it thereby violated Section 8(a)(5) and (1) of the Act. Specifically, Respondent contends that the certification was improper because the Regional Director directed that the election be conducted at a time which did not coincide with Respondent's peak seasonal employment. Respondent further asserts that the Board should refuse to accept the transfer of this proceeding and should reconsider its denial of review of the Regional Director's Decision and Direction of Election.

Respondent also contends that newly discovered evidence requires that the Board deny the Motions for Summary Judgment. In support of this contention Respondent avers that subsequent to the election approximately 35 percent of those employees on its recall list who were deemed eligible to vote by the Regional Director have refused Respondent's offer to return to work. Respondent contends that events have proved its original argument that an immediate election was improper because the identity of the seasonal workers could not be ascertained until the peak season of employment.

In his Motion for Summary Judgment, the General Counsel argues that there are no issues requiring a hearing, and that Respondent is attempting to relitigate issues which were raised and determined by the Board in the underlying representation case. We agree with the General Counsel. Review of the record, including the record in Case 6-RC-9023, shows that on June 24, 1981, following a hearing, the Regional Director issued a Decision and Direction of Election wherein he found that an immediate election was appropriate inasmuch as Respondent was engaged in year-round production and the number of permanent employees was substantial in comparison to the ultimate number of seaonsal employees. The Regional Director further concluded that 28 individuals listed on Respondent's initial recall list for peak season employment were eligible to vote because they were analogous to employees who have been laid off but not yet recalled and

[1] Official notice is taken of the record in the representation proceeding, Case 6-RC-9023, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

who have a reasonable likelihood of being recalled in the near future.

On July 2, 1981, Respondent filed a request for review of the Regional Director's decision. Respondent argued that it had a seasonal operation, that an immediate election was improper, and that the seasonal employees to be recalled were not sufficiently identifiable so as to permit them to vote in the election. On July 20, 1981, the Board telegraphically denied the request for review on the ground that the request raised no substantial issues warranting review. On August 10, 1981, after an election conducted by the Regional Director, the Union was certified as the exclusive collective-bargaining agent for the unit employees. By letter dated August 17, 1981, Respondent expressly stated that it declined a request to bargain with the Union as the certified representative of its employees in order to gain judicial review of Respondent's contention that the certification is invalid because the Regional Director refused to direct the election at the time of Respondent's peak seasonal employment.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. In this regard, we find no merit in Respondent's contention that the refusal of certain employees on Respondent's seasonal reall list to return to work constitutes newly discovered evidence relevant to the preelection determination of the voting eligibility of those employees.

We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment.[3]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Delaware corporation engaged in the manufacture and nonretail distribution of paper and related products with its principal office located in Lynbrook, New York, and with a place of business located in Mt. Union, Pennsylvania. During the 12-month period ending July 31, 1981, Respondent in the course and conduct of its business operations sold and shipped from its Mt. Union, Pennsylvania, facility products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees, including seasonal employees, employed by the Employer at its Mt. Union, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

2. The certification

On July 30, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 6, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on August 10, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

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[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] We deny the General Counsel's motion to strike Respondent's affirmative defense in its answer to the complaint.

In light of our ruling on the General Counsel's Motion for Summary Judgment, we find it unnecessary to pass upon the Union's similar motion.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about August 14, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit.

Commencing on or about August 14, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 14, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.[4]

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Bleyer Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees, including seasonal employees, employed by the Employer at its Mt. Union, Pennsylvania, facility; excluding all office clerical employees, and guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 10, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 14, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bleyer Industries, Inc., Mt. Union, Pennsylvania, its officers, agents, successors, and assigns, shall:

[4] The Union has requested the Board to fashion a "make-whole" remedy including a retroactive bargaining order, an award of litigation costs and expenses, and the establishment of an interim grievance procedure. In the absence of evidence that Respondent has engaged in outrageous unfair labor practices or frivolous litigation which might warrant consideration of these extraordinary remedies, we deny the Union's request.

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including seasonal employees, employed by the Employer at its Mt. Union, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Mt. Union, Pennsylvania, facility copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time production and maintenance employees, including seasonal employees, employed by the Employer at its Mt. Union, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

BLEYER INDUSTRIES, INC.